

**A Tan Lee Hong v Letchmee (Representative of the
 estate of Varathen, decd)**

HIGH COURT (PENANG) — CIVIL APPEAL NO 12-71-93

B SELVENTHIRANATHAN JC
12 NOVEMBER 1993

Civil Procedure — Time — Extension of time — Time fixed by rules of court — Lodgment of security for costs of appeal from sessions court to High Court — Jurisdiction of High Court to hear application — Courts of Judicature Act 1964 s 25(2) — Subordinate Courts Rules 1980 O 49 r 2(5)

C The appellant had earlier applied to the High Court for an order that leave be given to them to lodge RM250 prescribed in the Subordinate Courts Rules 1980 ('the SCR') as security for the costs of appeal from the sessions court to the High Court outside the 14-day time limit specified. The High Court dismissed the application for enlargement of time and the appellant applied for leave to appeal to the Supreme Court as the value of the subject-matter was less than RM100,000.

Held, dismissing the application:

- E** (1) It is open to a party appealing against a decision to apply to the court appealed from for an enlargement of time to pay the deposit or lodge the security for the costs of the appeal outside the stipulated 14-day period.
- F** (2) The exercise of the additional powers of the High Court under s 25(2) of the Courts of Judicature Act 1954 ('the Act') and para 8 of the schedule to the Act to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding is subject to the proviso to s 25(2), which states that all such powers shall be exercised in accordance with any written law or rules of court relating to the same. The SCR fall within the meaning of 'written law' in that proviso and, as O 49 r 2(5)(b)
- G** specifically provides for such an application to be made to the court appealed from, the High Court lacked the power and jurisdiction to hear the application herein.
- H** (3) As the application for enlargement of time should not have been made to the High Court and was misconceived, the application for leave to appeal to the Supreme Court must necessarily fail.

[Bahasa Malaysia summary]

I Perayu telah memohon terlebih dahulu ke Mahkamah Tinggi untuk suatu perintah supaya mereka dibenar menyerahkan RM250 yang ditetapkan dalam Kaedah-Keadah Mahkamah Rendah 1980 ('KMR') sebagai jaminan kos rayuan daripada mahkamah sesyen ke Mahkamah Tinggi di luar had masa 14 hari seperti yang ditetapkan. Mahkamah Tinggi telah menolak permohonan perlanjutan masa itu dan perayu

telah memohon kebenaran untuk membuat rayuan ke Mahkamah Agung kerana nilai isi perkara adalah kurang daripada RM100,000.

Diputuskan, menolak permohonan itu:

- (1) Adalah terbuka kepada pihak yang membuat rayuan terhadap sesuatu keputusan untuk memohon kepada mahkamah dari mana rayuan itu dibuat, untuk suatu perlanjutan masa membayar deposit atau menyerah jaminan kos rayuan di luar had masa 14 hari yang diperuntukkan itu.
- (2) Penggunaan kuasa tambahan Mahkamah Tinggi di bawah s 25(2) Akta Mahkamah Kehakiman 1954 ('Akta itu') dan perenggan 8 jadual kepada Akta itu untuk melanjutkan atau menyingkatkan masa yang ditetapkan oleh sebarang undang-undang bertulis untuk melakukan sebarang tindakan atau mengambil sebarang prosiding tertakluk kepada proviso kepada s 25(2), yang menyatakan bahawa kesemua kuasa seperti itu mesti digunakan mengikut sebarang undang-undang bertulis atau kaedah mahkamah yang berkaitan. KMR termasuk dalam makna 'undang-undang bertulis' dalam proviso itu dan, oleh kerana O 49 r 2(5)(b) memperuntukkan secara spesifik bahawa suatu permohonan seperti itu patut dibuat kepada mahkamah dari mana rayuan itu dibuat, Mahkamah Tinggi tidak mempunyai kuasa dan bidang kuasa untuk mendengar permohonan ini.
- (3) Memandangkan bahawa permohonan untuk perlanjutan masa tidak seharusnya dibuat ke Mahkamah Tinggi dan adalah salah tanggap, permohonan untuk kebenaran membuat rayuan kepada Mahkamah Agung semestinya gagal.]

Notes

For a case on the court's jurisdiction to extend time fixed by rules of court, see 2 *Mallal's Digest* (4th Ed) para 2336.

Legislation referred to

Courts of Judicature Act 1964 s 25

Subordinate Courts Rules 1980 O 49 r 2(5)

Ismadi Zainal Abidin (Mahinder Singh Dulku, Ismadi & Co) for the appellant.

Malkit Singh (Darshan Singh & Co) for the respondent.

Selventhiranathan JC: It is not my intention by this decision to set the cat among the pigeons but if that is the end result, so be it until the matter is determined otherwise.

This is an application by the appellant (the defendant in the court below) for leave to appeal ('the appeal application') to the Supreme Court pursuant to s 68(1) of the Courts of Judicature Act 1964 ('the Act') as the value of the subject-matter herein is below RM100,000.

On 25 October 1993, I heard an application by the appellant for the following orders:

- A (1) that leave be given to the appellant to pay the deposit of RM250 into court outside the time limit specified;
(2) that the appellant be given leave to proceed with the appeal herein;
(3) that the costs of this application be borne by the appellant; and
(4) for other appropriate relief.
- B This application ('the enlargement of time application') was supported by the affidavit of one Ismadi Zainal Abidin, an advocate and solicitor who appeared on behalf of the appellant. He deposed that his firm received the notice in Form 141 of the Subordinate Courts Rules 1980 ('the SCR') on 25 September 1993, informing them that the notes of evidence and grounds of decision in the case were ready and the cost of preparing the same amounted to RM251.56. The notice which was exhibited to the affidavit stated that in connection with the cost of preparing the said record (ie the notes of evidence and grounds of decision), a sum of RM251.56 had to be paid. On 27 September 1993, the firm made payment of the sum to the court concerned and obtained the notes of evidence and the grounds of decision.
- C The letter forwarding the sum of RM251.56 to the sessions court which was exhibited to the affidavit stated very clearly that the *payment* was made *for* the firm to be supplied with the *notes of evidence and grounds of decision* (emphasis added). On 7 October 1993, the firm filed the memorandum of appeal in the High Court. On 15 October 1993, the firm was informed by the registrar of the sessions court that the appellant had not lodged in the sessions court the sum of RM250 by way of security for the costs of the appeal within a period of 14 days from the date of receipt of the Form 141 notice and in the circumstances the court treated the appeal as being abandoned ('... mahkamah menganggap rayuan diketepikan').
- D It was further deposed that when the payment of RM251.56 was made, a clerk of the firm, through an oversight, forgot to pay in the security of RM250 which was required to be paid. When the firm became aware of the oversight, they immediately filed the enlargement of time application to lodge the security outside the 14-day period.
- E At the hearing of the enlargement of time application, Encik Ismadi Zainal Abidin appeared for the appellant and Encik Ranjit Singh mentioned the case on behalf of Encik Darshan Singh, counsel for the respondent. Encik Ranjit Singh informed the court that Encik Darshan Singh was ill and was unable to attend. However, I proceeded to hear the application and Encik Ismadi made his submission. At the close of submission, I ruled that this was not a proper case for the court to exercise its discretion and grant the application for enlargement of time to pay in the security for the costs of the appeal, and I therefore dismissed the application.
- F Today, Encik Ismadi and Encik Malkit Singh appear before me on the application by the appellant to seek the leave of this court to appeal to the Supreme Court. Arguments were advanced as to why such leave should be granted and they are recorded in the notes of proceedings and I do not propose to repeat them here in full. In short, Encik Ismadi contended, on behalf of the appellant, that all the requirements for appealing to the High Court from the sessions court had been complied with except that the
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security of RM250 had not been lodged within the time prescribed. He stated that there was a dearth of authorities directly on point and therefore this matter needed final determination by the Supreme Court.

Encik Malkit Singh submitted that this was not a proper case for leave to appeal to the Supreme Court to be granted because the decision had been arrived at at first instance through witness evidence. There had been a full trial and the decision was made after hearing the witnesses. There was nothing in the affidavit of Encik Ismadi to show that there were merits in the appeal as such, besides his bare averment to that effect.

Order 49 r 2(5) of the SCR provides as follows:

Within 14 days from the receipt of the notification, the appellant shall, unless the court for sufficient cause otherwise orders:

- (a) deposit in the court appealed from a sum which in the opinion of the registrar will cover the costs of preparing a sufficient number of copies of the appeal record for the use of the High Court and the parties to the appeal; and
- (b) lodge in the court appealed from a sum of two hundred and fifty dollars, or such lesser sum as the court may in any case direct, by way of security for the costs of the appeal.

It is abundantly clear from paras (a) and (b) of sub-r (5) that two payments into court are involved:

- (a) one payment is the deposit to cover the costs of preparing a sufficient number of copies of the appeal record; and
- (b) the other payment is to provide security for the costs of the appeal.

Should the party appealing against the decision not be able to comply with the requirements of para (a) or (b) of sub-r (5) within the stipulated time-frame of 14 days, it is open to that party to apply to the court appealed from for an enlargement of time to pay the deposit or lodge the security for the costs of the appeal, as the case may be. The court appealed from would then have to decide whether there are sufficient grounds to allow the party appealing to lodge the security for the costs of the appeal outside the 14-day period stipulated. In such circumstances, that court would have to consider whether the grounds given for failure to comply with the requirement of para (b) of sub-r (5) are sufficient for the court to enlarge the time within which the security for the costs of the appeal is to be lodged in the court appealed from. Encik Ismadi argued that the High Court could enlarge the time within which the security could be lodged pursuant to its powers under sub-s (2) of s 25 of the Act. With respect, I do not agree. The exercise of the additional powers of the High Court under that subsection and para 8 of the schedule to the Act to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding is subject to the proviso to that subsection. Section 25 reads:

- (1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

- A (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

- B The SCR fall within the meaning of 'written law' in that proviso. Therefore, it is the SCR which have to be looked into when making any application for the enlargement of time within which the security for the costs of the appeal is to be lodged in the court. Order 49 r 2(5)(b) of the SCR clearly empowers the court appealed from to enlarge the time beyond the 14-day period within which the security is to be lodged. That court will of course have to have regard to the circumstances obtaining and decide whether the reasons given for failing to lodge the security within time are sufficient to allow the application. In this regard, no doubt the court will bear in mind the authorities on the point and exercise its discretion appropriately.
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- I therefore hold that this court lacks the power and jurisdiction to hear the enlargement of time application herein. This is because O 49 r 2(5)(b) of the SCR specifically provides for such an application to be made to the court appealed from. In these circumstances, should the High Court hear the application, it would be arrogating to itself a power and jurisdiction which is not conferred upon it by law. I am fortified in taking this approach by art 121 of the Federal Constitution as amended by Act A704 which came into force in 1983. That Article stipulates, inter alia, that the High Court and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law. The jurisdiction and power to enlarge time in this case is clearly conferred on the inferior court concerned by O 49 r 2(5)(b) of the SCR and therefore, it is that court which should exercise that power and jurisdiction and not the High Court. In the circumstances,
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- E I hold that the enlargement of time application should not in the first place have been made to the High Court and since that application was misconceived, this application for leave to appeal to the Supreme Court must necessarily fail and I therefore make an order dismissing this application. There will be no order as to costs as the respondent chose to be heard on this ex parte application.
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- G *Application dismissed.*

Reported by Kevin Ooi

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